

89-551

(1)

NO.

Supreme Court, U.S.

FILED

AUG 28 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

October term, 1989

GEORGE JUSTICE MOOR,

Petitioner,

v.

THE CITY OF AUBURN HILLS,
MAURICE JAMES NOLIN,

Respondents.

On writ of certiorari
in the United States
Court of Appeals for
the sixth circuit

PETITION FOR WRIT OF CERTIORARI

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25 pp

STATEMENT OF QUESTIONS TO BE REVIEWED

Q1. Is it part of a police officer's duty to order peaceful citizens from a public street so a suspect can be questioned in private?

2. Should a citizen be subject to arrest for failing to leave a public street when so ordered by an officer who wants to question the citizen's son in private?

Q3. Should the court grant qualified immunity to a police officer on the grounds that a citizen's failure to vacate a public street when so ordered is the basis for a good faith arrest?

Q4. Do citizens have a clearly established right to remain on the public street when their children are being questioned by a police officer?

Q5. Should the court grant immunity to respondents based on a decision upholding the arrest even though a higher court later ordered the decision be "overturned and held for nought"?

Q6. Should the court first inquire about the constitutionality of the local ordinance under which petitioner was convicted before using the overturned jury decision as evidence of a good faith arrest by respondent officer Nolin?

Q7. Should the court first inquire about the adequacy of jury instruction before using the overturned jury decision as evidence of a good faith arrest by defendant officer?

Q8. Should the court first inquire if the alleged acts upon which petitioner's conviction was based constituted a crime before using the overturned decision as a basis for a good faith arrest by the respondents?

Q9. Did the federal court violate Supreme Court rules delineated in "Harlow v Fitzgerald" when it granted immunity to respondent officer based on acts that violated clearly established rights?

Q10. Did the state judge who presided at petitioner's criminal trial have a duty to inform the jury that citizens are not required to vacate the street when arbitrarily so ordered by a police officer?

Q11. Were petitioner's substantive constitutional rights violated when he was frisked, search, and seized without probable cause or warrant?

Q12. Should the conscience of the court have been shocked at the conduct of respondent officer?

Q13. Should the court have ruled that petitioner's arrest by respondent officer must have been without probable cause since there was no evidence supporting the charge?

LIST OF PARTIES

The plaintiff appellant in this case is George Justice Moor. He is a citizen of the United States and resides in the city of Bloomfield Hills in the state of Michigan.

The defendant respondent in this action is Maurice James Nolin who was employed as a police officer for the city of Auburn Hills which is a city located in the state of Michigan. To simplify the case, only the allegations against respondent Nolin will be argued.

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JUDGEMENTS TO BE REVIEWED

Petitioner seeks this Honorable Court to review the following judgements:

1. Page six of the May 27, 1989 order of the United States District Court in which judge DeMascio wrote "plaintiff concedes *** that he was ordered *** to leave the site *** and refused to do so.

This fact alone establishes a good faith basis for Nolin's arrest."

2. Pages six and seven of Judge DeMascio's May 27, 1989 decision in which he wrote "the juries guilty verdict, although overturned, also supports a finding of good faith."

3. Page seven of judge DeMascio's May 27, 1989 order in which he wrote, "The conduct alleged in the complaint, although certainly not condonable, is not such that 'shocks the conscience' of the court."

4. Page one of the June 6, 1989 order of the Sixth Circuit Court of Appeals where the decision stated, "xxx the petition for rehearing has been referred to the original hearing panel. We affirm the judgement of the district court for the reasons stated in the district court's orders dated July 13, 1987 and May 27, 1988."

5. The July 19, 1989 order of the Sixth Circuit Court of Appeals where petitioner's petition for a rehearing was denied on the following grounds, "The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied."

JURISDICTIONAL STATEMENTS

The jurisdiction of this writ is based on " Rules of the Supreme Court 17.1c" which states that a valid jurisdictional ground is invoked "when a federal court of appeals has decided an important question of federal law *** in a way in conflict with applicable decisions of this Court."

Petitioner asserts that this court has forbidden federal courts to grant qualified immunity based on acts that violate clearly established rights and laws. Respondent officer Nolin's arrest of petitioner was based on the officer's arbitrary ordering of petitioner to vacate a public street so the officer could question petitioner's emotionally disturbed son in private. This court has prohibited officers from arbitrarily ordering citizens from public streets and has stated that

citizens may ignore those orders without fear of legal reprisal. The respondent officer also caused petitioner to be searched, seized and arrested without probable cause or warrant which is clearly prohibited by the Constitution. Respondent officer also caused petitioner to be arrested for acts that, even if accepted as true, are not violations of law. Respondent officer also issued a false police report and offered purjured testimony at petitioner's criminal trial. All the acts are clearly prohibited and bar the federal courts from granting qualified immunity to respondent officer.

The jurisdiction of this writ is also based on "Rules of the Supreme Court" 17.1a which states a a valid jurisdictional claim is invoked "when a federal court of appeals has rendered a decision *** in conflict with the state court of last resort. Petitioner Moor claims that the

federal courts violated a high Michigan state court when it granted qualified immunity to respondent based on a decision that was "reversed and to be held for nought". The state court rendered its decision because they deemed the state trial to be unreliable and unfair. The federal courts are also in conflict with the state of Michigan high court's orders that declare that citizens have a right to have free and peaceful access to public streets, parks, and waterways.

INDEX OF AUTHORITY

1. *Shuttlesworth v Birmingham*; 394 US 147, 22 L Ed 2d 162, 89 S Ct 935.

"A law subjecting the exercise of first amendment freedoms of speech and assembly to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional".

22 L Ed 2d at 165

"A person faced with a licensing law that is unconstitutional as violating the right to freedom of speech may ignore such law and engage with impunity in the exercise of the right of free expression".

22 L Ed 2d at 164

"Governmental authorities have the duty and responsibility to keep their streets open and available for movement."

22 L Ed 2d at 165

"The privilege of a citizen of the United States to use the streets and parks for communication *** must not in the guise of regulation be abridged or denied."

22 L Ed 2d at 165

"Even when the use of its public streets and sidewalks is involved, a municipality may not empower its *** officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question."

22 L Ed 2d at 165

2. Harlow v Fitzgerald, 457 US 800

"We therefore hold that government officials performing discretionary functions *** are shielded from liability *** insofar as their conduct does not violate clearly established *** rights ***."
457 US at 818

"In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party."

457 US at 816

3. King v Arabic, 159 Mich App 452 at 461.

"Trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial when there is the slightest doubt as to the facts."

4. Michigan Revised Judicature Act Public Nuisances 600.3801 note 6.

"To be a public nuisance the activity must *** prevent the public from the peaceful use of *** the public streets."

5. City of Auburn Hills ordinance 5(a) - interfering with police.

"No person shall resist a police officer, any member of the police department or any person duly empowered with police authority while in the discharge or apparent discharge of his duty, or any way interfere with or hinder him in the discharge of his duty".

6. Article 1 of U.S. Constitution.

"Congress shall make no law *** abridging freedom of speech, *** or the right of the people to peaceably to assemble, and to petition the government for a redress of grievances."

7. Article 4 of U.S. Constitution.

"The right of the people to be secure in their persons *** against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause."

8. Article 14 of U.S. Constitution.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

9. Gregory v City of Chicago, 89 S Ct 946 (1969).

"*** the verdict of the jury for all we know may have been rendered on (an unconstitutional) ground alone, since it did not specify the basis on which it rested. It therefore follows here as in Stromberg *** that if one of the grounds for conviction is invalid under the Federal Constitution the judgement can not be sustained."

10. American Jurisprudence, sec 23.

"Where a person by words or conduct interferes in behalf of another, the offence of obstructing an officer will be

held committed where either actual force is used or a threat is made ***. But no offense is committed where force is neither used nor threatened, for instance, where a person quietly and peaceably asks questions to gain information, or without any overt act to impede or intimidate the officer, protests against the arrest of another, or requests the release of an alleged offender."

FACTS OF THE CASE

Petitioner lived in Bloomfield Hills, Michigan with his wife Virginia, and his son, David. On the night of December 4, 1985 at 9:40 pm. a trespassing complaint was phoned in to the Auburn Hills police department regarding petitioner's son. Respondant officer Nolin was dispatched and en route to the scene found David Moor talking to witness Marie Gullett a block away from the complainant's house. Respondant officer Nolin ordered plaintiff's son to remain where he was until the officer returned from questioning the complainants.

Petitioner, as well as others had noticed strange behavior on David's part. Petitioner's son was so emotionally distraught that he attempted suicide several days later. On pages 13 and 14 of David Moor's April 11, 1988 deposition (docket

nr#84) David was asked, "Is it safe to say that *** you were experiencing emotional problems?" Petitioner's son responded, "Yes, I was." He was then asked, " *** did you attempt suicide?" He responded, "Yes." Respondent officer Nolin was also aware of the emotional problems that petitioner's son was experiencing. In interrogatory #119 respondent officer Nolin testified (cf. docket nr#57) regarding a December 4, 1985 interview with the complainants. "The Cross' were all afraid of him (David). I recall a discussion regarding a possible joint suicide between David Moor and their daughter (David's girl friend)".

Petitioner's son, noticing that he did not have identification used witness Gullett's telephone to ask petitioner to bring his wallet to the scene. In item

nineteen of his affidavit (docket nr#83) petitioner testified that in the telephone conversation " *** David told me that officer Nolin was very rude to him and that David believed that officer Nolin wanted to pick a fight with him". On page 90 of the court transcript (docket nr#15) petitioner testified, "David told me that he believed the officer was interested in giving him a hard time." The officer's rudeness was also noticed by witness Gullett who testified on pages 67 and 68 of the court transcript (docket nr#15) "*** the officer pulled up, got out of his car, came up to David *** and said, 'I want you to stay here, I gotta go talk to some people and I kept saying. 'Sir, sir *** '. He just would turn his back to me and walk back to his car. *** He completely ignored me." Petitioner Moor's first response to his son's story, according to pages 90 and 91 of the court transcript

(docket nr#15) was to ask, "David, what did you do wrong?" On page 98 of the same court transcript petitioner testified, 'xxx when I first went there I did not believe that officer Nolin was going to give David a hard time. I was afraid David was going to give officer Nolin a hard time. David had hit me the week before. He was violent". On page 100 of the same court transcript petitioner testified that he did not want his son to "to stike officer Nolin, commit assault, and go down the river for a few years."

Petitioner Moor arrived at witness Gullett's house and talked with her for about fifteen minutes. At 10:12 pm. respondent officer Maurice Nolin finished questioning the complainants and cleared their house (cf. police dispatcher report docket nr#19). Respondent officer Nolin drove his police car back to the Gullett residence and parked in the public

street. Respondent officer saw petitioner Moor, petitioner's son and witness Gullett speaking to each other on witness Gullett's back porch. Respondent Nolin made a beckoning motion and both petitioner Moor and his son approached Nolin's police car. Respondent officer Nolin in his police report (docket nr#86) stated, "I parked in the street and motioned for David to come to my vehicle. *** George Moor followed and I asked him to leave so that I might speak with David. *** From that point on I could not complete a question *** without his father interrupting."

Petitioner Moor in pages 93 through 95 of the April 15, 1985 state court transcript (docket nr#15) testified that as he approached Nolin's police car, he stated, "I am David's father, why are you detaining my son here?" Officer Nolin facetiously asked if petitioner was David's lawyer and told petitioner to "Get

lost." When petitioner failed to respond to respondent officer Nolin's demand, petitioner was arrested for "interfering with an officer during the performance of his duties." Witness David Moor's account is similar and may be summarized from pages eight and nine of his April 11, 1988 deposition (docket nr#84) where he stated:

A. " *** George Moor walked up and says, 'Why is my son being detained?' The officer *** replied, " *** Get lost! Do you want to be arrested?' George Moor commented, ' *** what for?' Then he (Nolin) proceeded to arrest him. *** He (George Moor) never made any statement for me not to cooperate.'

Q. Do you believe officer Nolin had an opportunity to question you and make statements if he had so desired?

A. He could have if he wanted to."

Witness Gullett offered no support to respondent officer Nolin's claim that petitioner Moor interfered with the officer's investigation. On page 71 of the April 15, 1986 transcript she testified, "*** he (Nolin) pulled up *** and motioned to come over to the car. *** Mr Moor

(petitioner) went *** and all I heard was, 'This is my son, why are you detaining him here? *** He (Nolin) frisked him (petitioner)."

On April 15, 1985 petitioner Moor was tried in a Michigan Court before the Hon. James Sheehy. Respondents produced no evidence supporting officer Nolin's charges. Chief of police Raynor testified that petitioner confessed that he was ordered to leave the public streets and failed to do so. Hon. James Sheehy did not instruct the jury that citizens have a right to peaceful access to public streets; nor did the judge comment on the prosecuting attorney's statement that anarchy would result if citizen's failed to obey the officer's orders. The Oakland Country Circuit Court reviewed the lower court decision and ordered the "decision overturned and to be held for nought."

ORIGINAL JURISDICTION

The first complaint sought pendant jurisdiction for state causes of action under false arrest, malicious prosecution, and negligence. In addition declaratory judgment was sought against the criminal proceedings that defendant Sheehy presided over, as well as the unconstitutionality of the local obstruction ordinance under which petitioner was prosecuted. In the July 13, 1987 order the court rejected petitioners claim under the Declaratory Judgement act on the grounds that there was not an actual controversy regarding the court proceeding or the constitutionality of the local ordinance since petitioner did not stand in a present danger of being rearrested under the same charge. Although petitioner did not fear a rearrest under the local obstruction ordinance but did fear that the court would ac-

-cept, without review, the legality of both the local ordinance and the court proceedings and use both against the petitioner without review. This is exactly what the court did when it granted qualified immunity based on the state court proceedings under the local ordinance.

In the final amended complaint petitioner based his claim on 42 U.S.C 1983. Petitioner claimed that his First Amendment rights were violated in that he was arbitrarily ordered from the public streets when he was peacefully attempting to address grievances lodged by petitioner's son against a government official. Petitioner raised a claim under the Fourth Amendment claiming that his arrest was without any evidence and contrary to the only legal meaning of the local ordinance.

ARGUMENT OF CASE

1. The United States District Court in its May 27, 1989 order acknowledged that "the doctrine of qualified immunity protects an official's *** conduct where it does not violate clearly established *** rights." (cf. Harlow v Fitzgerald, 457 US at 818).

2. There is a clearly established First Amendment right that allows citizens the peaceful use of public streets.

a). This right was enforced twenty three years ago under "Shuttlesworth v Birmingham" 86 S Ct 211.

b). The Court in its decision forbade officers from arbitrarily ordering citizens from public streets. In "Shuttlesworth" the court stated "*** a municipality may not empower its officials to roam essentially at will, dispensing or withholding permission to speak, (or) assemble *** according to their own opinions regarding

the potential effect of the activity in question." (22 L Ed 2d at 165). Respondant officer Nolin stated in his police report that he ordered petitioner to leave so that he might speak with David. In the same police report respondent stated that it was after ordering petitioner from the streets that he was interrupted in his attempts to question petitioner's son. It should be remembered that all witnesses denied respondent's assertion that petitioner interrupted the questioning of petitioner's son. The point being made is that even if we accept respondent's unsupported account, petitioner was arbitrarily ordered from the public streets and from that point on that the officer could not complete his questioning of petitioner's son. In respondent Nolin's answer to the first set of interrogatories (docket nr#42) he testified

"INTERROGATORY NUMBERED 83:

On the night of December 4, 1985 did you order George Moor to leave the scene before you attempted to ask David Moor a single question?

ANSWER:

Yes."

c). The Court in its "Shuttlesworth" decision asserted that keeping the streets open for public use was a governmental duty and obligation. In the "Shuttlesworth" case the Court stated, "Governmental authorities have the duty and responsibility to keep their streets open and available for movement" (22 L Ed 2d at 165). Petitioner recognizes that there are times when an officer has the duty to order citizens from the public streets. Respondent Nolin has never claimed a valid reason for ordering petitioner from the street. Respondent refused to answer an interrogatory that asked if he believed it to be a part of his duty to question suspects in private. Respondent refused to answer an interrogatory that asked if he

desired to question petitioner's son in private, did he consider questioning him in the privacy of his squad car or at the police station. When respondent officer Nolin ordered petitioner to vacate the streets so he could question petitioner's son in private, he not only violated petitioner's First Amendment rights but he also exceeded his authority and failed to perform his federal duty to keep the streets open for public use.

d). The Court has asserted that citizens who refuse to relinquish constitutional rights under governmental pressure will suffer no legal reprisals for the assertion of those rights. The Courts stated, "A person faced with a *** law that is unconstitutional *** may ignore such law and engage with impunity in the exercise of the right ***" (cf. "Shuttlesworth", 22 L Ed 2d at 164). Petitioner had a valid concern over the mental instability of his

son causing a crime of assault to be perpetrated on the officer. Petitioner asserted his right to peaceful access of the public streets to relay to the officer that petitioner's son feared that the officer sought to provoke a fight. This is covered under the First Amendment rights of freedom of speech and the right to assemble before government officials for an address of grievances. To grant immunity based on petitioner's refusal to relinquish his First Amendment rights sends a chilling message to citizens that citizens are fair game for governmental abuse if they do not volunteer to relinquish rights when the government so demands.

3. The federal courts have refused to acknowledge, let alone enforce petitioner's rights to peaceful access to the public streets. Petitioner's complaint claimed a violation of First Amendment rights, but no reference to these rights were men-

tioned when the court dismissed the complaint. Petitioner filed a motion for rehearing in the United States District Court in which the arguments presented in this petition were restated. The lower federal court denied the motion saying that petitioner stated no new argument. Petitioner claimed the same constitutional rights in the Federal Appeals Court where they upheld, without comment, the decision of the lower court. When petitioner filed a petition for rehearing in the appeals court, the court stated that they had originally considered the argument. The reason the federal courts have issued no comment on petitioner's claim that immunity can not be granted for acts violating petitioner's First Amendment rights is that the argument is self evident and the federal courts refuse to uphold those rights that only exist on paper. Even re-

spondent agreed that the right to peaceful access to public streets is a constitutional right. On page nine of respondent's appeal brief they state, "There is no question that appellant *** has a right to free access to public streets." It makes a mockery of the judicial system for the courts to grant immunity based on acts that all parties agree would be in violation of basic rights.

4. In its May 27, 1988 order the court stated, "The conduct alleged in the complaint although certainly not condonable, is not such that shocks the conscience of the court". The court further stated, "This is not a case which fits the other prong of substantive due process -- official acts which may not take place no matter what procedural protections accompany them." Petitioner alleged that on route to the police station he told

respondent officer Nolin that there was no probable cause to support his obstruction arrest (cf. Second amended complaint art. 31, docket nr#28). Petitioner claimed that Nolin gave a wink and said that by the time he finished writing the police report, there would be enough evidence -- he taunted petitioner that he would issue a false police report. Responent Nolin then went before a jury and committed perjury. His police report had not been introduced as evidence during the jury trial and it showed that he had lied to the jury. It was alleged that respondent willfully violated petitioner's First Amendment right of free speech and assembly. It was shown that officer Nolin had previously had complaints of violence and lying that had been a factor in his being demoted multiple times. Surely this history of prior misconduct tends to show a pattern supporting petitioner's account.

The courts conscience should be shocked at the violation of rights and the commission of crimes perpetrated to protect an officer from disciplinary action. Filing false police reports, committing perjury, and violating an individuals First Amendment rights qualifies as conduct that should not take place under any circumstance.

5. The court in its May 27, 1988 court order based its determination of a good faith arrest upon the jury's guilty verdict. This Court has in "Gregory v City of Chicago, 89 S Ct 946 (1969) stated that if the verdict of a jury could be based on an unconstitutional ground, that verdict may not be used. The Jury was not instructed that citizens have a right to peaceful access to public streets and are not required to vacate a street if the request is arbitrary. Petitioner believes the state judge who presided over the criminal proceeding lead the jury to believe that

no such right existed. Petitioner asserts that the jury was not properly instructed regarding the obstruction ordinance on the grounds that section 23 of American Jurisprudence specifically states that when a third party comes to the aid of another being arrested and merely asks questions, there is no basis for the third party being arrested for obstruction. A higher state court overturned the conviction and ordered all to "hold it for nought". The federal court should obey the higher state court order, especially since the federal court has refused to consider those allegations and declaratory remedies that would have examined the state court proceeding that lead to the jury conviction.

CONCLUSION

Petitioner Moor prays this honorable court to order petitioner's case against respondent officer Nolin to go to trial in the United States District Court located in Detroit, Michigan. Petitioner requests that this court state that immunity can not be granted to a law enforcement officer on the basis that petitioner failed to relinquish his right to have peaceful access to the public street where his emotionally disturbed son was being questioned.

Respectfully submitted by:

Justice Moor